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No. 03-1427

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE EUROPEAN COMMUNITY, *et al.*,

Petitioners,

v.

RJR NABISCO, INC., *et al.*,

Respondents.

DEPARTMENTS OF THE REPUBLIC OF COLOMBIA,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *iii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

The tobacco companies' opposition brief contains several variations on a single theme: U.S. courts are powerless to *enjoin* U.S.-based smuggling schemes that contravene *U.S. domestic common law*.

This extraordinary position is predicated on the judge-made revenue rule, which this Court is expected to construe in *United States v. Pasquantino*, 336 F.3d 321 (4th Cir. 2003) (*en banc*), *cert. granted*, 124 S. Ct. 1875 (2004) (No. 03-725). In light of *Pasquantino* and intervening treaty action by the U.S., this Court should hold the petition and, thereafter, grant the petition, vacate the judgment, and remand the case ("GVR"). Alternatively, for all of the reasons previously set forth (Pet. at 11-26), this Court should grant the petition and accord the case plenary review.

I. This Court Should Hold The Petition In Light Of *Pasquantino*

The linchpin of the tobacco companies' position is the common law revenue rule, which is directly at issue in *Pasquantino*. The revenue rule is also the main focus of the instant petition, and is the subject of several conflicts between the opinion below and the decisions of this Court and other Courts of Appeals. *See* Pet. at 11-13 (conflict concerning definition of revenue rule); 11-13 (conflict concerning the applicability of the revenue rule to claims for injunctive relief), 16-17 (conflict concerning whether the revenue rule applies to cases under U.S. domestic law); 20-23 (conflict concerning the federal Judiciary's equitable power to enjoin harmful conduct); 23-25 (conflict concerning whether the revenue rule is permissive or mandatory).

This Court should hold the petition because *Pasquantino* will likely resolve several direct conflicts between the Fourth and Second Circuits. For example, in *Pasquantino*, *both* the majority and dissenting opinions determined that the revenue rule is "permissive," *Pasquantino*, 336 F.3d at 329, and "discretionary," *ibid.*, 336 F.3d at 340 (Gregory, J., dissenting). In contrast, the Second Circuit rejected the view that the rule was "discretionary" (App. 27a), and treated the rule as a mandatory bar under which the courts "may not" entertain a claim to enjoin a smuggling scheme. App. 28a; Pet. at 23-25.[1] In addition, *Pasquantino* recognized that the revenue rule is limited to cases seeking enforcement of foreign tax judgments (336 F.3d at 329 & n.3); in contrast, the court below incorrectly extended the revenue rule to bar claims under *U.S. domestic common law* that seek to *enjoin* U.S.-based conduct and do not seek recovery of lost foreign taxes. App. 27a; Pet. at 11-13. *Pasquantino* will likely resolve such conflicts; this Court should therefore hold the petition and accord the case GVR treatment.

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1. Respondents assert that the Second Circuit did not hold that the revenue rule was mandatory and there is no conflict. Br. in Opp. 21. In fact, as respondents acknowledge (*ibid.*), the court below held that federal courts "may not" hear smuggling claims. Similarly, the Second Circuit held that, under the revenue rule, "we have no choice" but to bar Canada's claims for "lost tax revenues and tax enforcement costs as RICO damages." *Attorney General of Canada v. R.J. Reynolds Tobacco Co.*, 268 F.3d 103, 106 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002) ("*Canada*"). The Second Circuit's view also conflicts with *Milwaukee County v. M.E. White Company*, 296 U.S. 268, 272 (1935) (revenue rule is not jurisdictional; "comity" allows a court to entertain a foreign tax claim).

II. Respondents' Effort To Distinguish *Pasquantino* Is Unavailing

Respondents argue that the revenue rule is inapplicable in federal criminal cases to combat smuggling (*Pasquantino*), but is a categorical bar to common law claims seeking to enjoin the same conduct. Br. in Opp. 2, 14-16. This civil-criminal dichotomy is inapplicable and constitutionally flawed.

A. The Revenue Rule And The Civil-Criminal Dichotomy Are Inapplicable To Claims For Injunctive Relief Under U.S. Domestic Common Law

The revenue rule and the civil-criminal distinction adopted by the Second Circuit in applying it do not govern the common law claims for injunctive relief before this Court. Pet. at 11-13, 20-25. Petitioners seek injunctive relief under U.S. domestic common law to enjoin U.S.-based conduct that contravenes basic standards of care. The claims do not aim to collect foreign taxes or enforce foreign tax law, as respondents repeatedly assert. *See* Br. in Opp. i, 1, 9-10. The claims for injunctive relief do not seek money damages. The factual predicate for application of the revenue rule and its interpretive rules — a claim to collect foreign taxes — thus is not presented.

Without reference to any judge-made impediment such as the revenue rule or the civil-criminal distinction, the United States has sought equitable relief through direct civil litigation in foreign courts under *United States* law, even when that case relates to taxes. *See* Pet. at 14-15, citing, *inter alia*, *U.S. Securities and Exchange Commission v. Shull*, [1999] CarswellBC 1772 (B.C.S.C. [In Chambers]) (Can.).

Since the United States has obtained such equitable relief in foreign courts, it follows, *a fortiori*, that foreign States should be able to seek *injunctive* relief in U.S. courts under *U.S. law* in cases that do not seek to recover taxes.[2]

Consistent with this approach, the Fourth Circuit emphasized the "critical point" that a smuggling prosecution under U.S. domestic law vindicated *U.S. interests* in preventing wire fraud, and did not enforce foreign revenue laws or collect foreign taxes. *Pasquantino*, 336 F.3d at 331. The revenue rule does not apply when a civil claim is predicated on "state common law." *Canada*, 268 F.3d at 136 n.3 (Calabresi, J., dissenting). "[W]hen American law renders an activity — including the violations of foreign tax laws — an American tort or crime" there is no basis to apply the revenue rule. *Ibid.* at 137. Allowing a civil case to proceed under U.S. domestic law "advances *our own* interests." *Ibid.* at 136 (emphasis in original). Similarly, the common law claims for injunctive relief in this case do not seek to collect foreign taxes or enforce foreign tax law. Most importantly, the claims directly vindicate the substantial U.S. interest in eradicating U.S.-based conduct that facilitates organized crime and terrorism.

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2. It is disingenuous for respondents to argue that, in *Canada*, the "United States expressly agreed that claims for injunctive relief, like those presented here, are barred by the Revenue Rule." Br. in Opp. 12 (citing U.S. *Amicus* Brief at 14 n.1). First, the Second Circuit in *Canada* addressed only claims for "lost tax revenues and tax enforcement costs as RICO damages." *See Canada*, 268 F.3d at 106. Second, the Solicitor General's *amicus* brief in *Canada* was restricted to the specific claims for damages at issue, namely claims for "lost tax revenue and associated law enforcement costs." U.S. *Amicus* Br. at I. Indeed, the Solicitor General confirmed that because "claims for . . . equitable relief" might "be distinguished, for purposes of the revenue rule, from petitioner's claim for lost revenue," the equitable claims are "*not presented here*." *Amicus* Br. at 15 n.1 (emphasis added).

Consistent with the policy goals of U.S. domestic law, the dissent in *Canada* forcefully rejected the "civil-criminal distinction" on two bases: (1) "the Supreme Court's consistent refusal to treat criminal and civil RICO actions differently," and (2) "there is no basis in the revenue rule itself for treating criminal and civil cases differently." *Canada*, 268 F.3d at 139 (Calabresi, J., dissenting). This rationale is persuasive and it demonstrates that there is no basis for the civil-criminal distinction.

B. The Civil-Criminal Distinction Is Constitutionally Flawed

The Second Circuit's civil-criminal distinction is rooted in an inaccurate reading of *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972). The Second Circuit stated that it was this Court's "*holding*" in *First National City Bank* that "courts have allowed litigation to proceed when the executive branch expressed its consent to adjudication by the courts," *Canada*, 268 F.3d at 123 n.25 (emphasis added), such as where the Executive Branch "institutes a prosecution." App. 14a. In fact, the majority in *First National City Bank* reached the *opposite* conclusion, holding that federal courts need not obtain the permission of the Executive Branch to exercise their core powers. *See* Pet. at 25-26.

This misinterpretation gives rise to serious separation-of-powers concerns. Respondents contend that a court may only adjudicate a smuggling case with the "imprimatur" and "consent" of the Executive Branch. Br. in Opp. 14, 15. In fact, a federal court has never needed "the Executive's permission before invoking its jurisdiction" and to hold otherwise would raise serious separation-of-powers issues.

First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (Powell, J., concurring). *Accord Hamdi v. Rumsfeld*, No. 03-6696 (June 28, 2004), slip op. 29-30 (plurality opinion) (the position that the Judicial Branch "must forgo" entertaining a case simply because that is the outcome favored by the Executive "cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government") (emphasis in original).

Similarly, the Fourth Circuit recognized that a "significant separation of powers problem" would arise if the Court were to "play diplomat from the bench by relying on a novel expansion of the common law revenue rule." *Pasquantino*, 336 F.3d at 331. Not only did the Second Circuit expand the revenue rule to bar claims under U.S. statutory law in *Canada*, and to bar claims for common law injunctive relief in the court below (App. 27a), it also justified that *novel expansion* by its new civil-criminal distinction. App. 14a. This policymaking raises separation-of-powers concerns because it subjects the judicial relief available in U.S. courts to the discretionary approval or permission of Executive Branch personnel.

The civil-criminal distinction also raises federalism concerns. The Second Circuit's approach effectively deprives State and local officials — who are not officers of the Executive Branch — of the power to combat smuggling under State law absent the consent of Executive Branch personnel. If adopted by this Court, the civil-criminal distinction would impermissibly restrict the primary, independent role of the States in law enforcement. *See United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995).

In sum, this Court should not embrace the constitutionally flawed civil-criminal distinction, and should dispose of the case "on another ground," *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 569 n.33 (1947), namely that the revenue rule is inapplicable to actions predicated on U.S. domestic law that do not directly seek to collect foreign taxes.

III. GVR Treatment Is Appropriate Due To An Intervening Event: U.S. Treaty Action Expressly Confirming The Executive Branch's Strong Policy Favoring Broad Cooperation With Foreign States In Cigarette Smuggling Cases

This Court has accorded GVR treatment to cases where there have been "'intervening developments'" that "'reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may undermine the ultimate outcome of the litigation,'" *Lords Landing Village Condominium Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 896 (1997) (citation omitted).

On May 11, 2004, the United States signed the Framework Convention on Tobacco Control, WHA56.1 (May 21, 2003) ("FCTC"), and thereby expressly confirmed that it is United States policy to extend broad cooperation to foreign States in cigarette smuggling cases initiated by foreign States. *See* Supp. Br. for Petitioners.

The FCTC expressly embraces the policy that "cooperative action is necessary to eliminate all forms of illicit trade in cigarettes and other tobacco products, including

smuggling." FCTC, Preamble. To this end, the FCTC contains strong and unequivocal provisions, proposed and advocated by the United States, which require that all parties "shall" act to "promote cooperation" on an "international" and "intergovernmental" basis in "proceedings" brought to eliminate "illicit trade in tobacco products." FCTC, art. 15(6). The United States has publicly confirmed that "the treaty contains a strong U.S.-drafted provision against tobacco smuggling" which is designed to "prevent illicit trade in tobacco." HHS Press Release, May 11, 2004 (App. to Supp. Br. for Petitioners).

The FCTC negates the Second Circuit's overarching conclusion — and respondents' main argument before this Court (Br. in Opp. 1-2, 5-6, 12-13, 17-19) — that the United States "strictly limits" cooperation with foreign States in cigarette smuggling cases. *Canada*, 268 F.3d at 119; App. 14a. The Second Circuit had the "perception" that there was no "evidence" that the Executive Branch favors "assistance" to foreign States in cigarette smuggling cases. App. 14a, 25a. The FCTC, however, confirms that U.S. policy favors extending broad cooperation to foreign States in proceedings to combat cigarette smuggling. Accordingly, reconsideration of the Second Circuit's opinion in light of the FCTC may undermine the ultimate outcome of the litigation.

Hoping to sidestep the FCTC, respondents misrepresent the Convention's *text*. They left aside the governing text of Article 15(6), which requires "cooperation" on an "international" and "intergovernmental" basis in cigarette smuggling "proceedings." Instead, they incorrectly assert that the FCTC "only provides for information exchange among government agencies." Br. in Opp. 20. That subject appears in the FCTC, but is covered by a different provision: Article

15(5). The text of Article 15(6) is controlling here and the tobacco companies' *post hoc* effort to rewrite the FCTC to limit its scope is unavailing.[3]

Respondents incorrectly assert that the FCTC has no legal significance. Br. in Opp. 20. As a signatory, the United States, including its judiciary, is "obliged to refrain from acts which would defeat the object and purpose" of the FCTC. United Nations Convention on the Law of Treaties, S. Exec. Doc. L, 92d Cong., 1st Sess. (1971), art. 18(a) (signed for the United States on April 24, 1970). Refusing cooperation in this case based on the revenue rule defeats a key object and purpose of the FCTC and undermines a public policy promoted by the United States Government.[4]

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3. Respondents purport to recount the drafting history of the FCTC, asserting that the "U.S. delegation objected to a draft provision that would have imposed extraterritorial liability for duties and taxes." Br. in Opp. 19. This point is irrelevant to the issue of equitable relief before this Court. Moreover, respondents' "evidence" cannot override the final text of the FCTC, is indecipherable in any event, and should be considered, if at all, by the Court of Appeals on remand.

4. Respondents also err in arguing that Second Circuit "rejected Petitioners' interpretation" of the FCTC. Br. in Opp. 20. The Second Circuit's decision did not "reject" or even mention the FCTC. The Second Circuit's decision was rendered on January 14, 2004, well before the FCTC was signed by the United States. Moreover, as the World Health Organization explained, the FCTC "is not intended to and will not supplant rights that accrue to persons, including governments, under U.S. domestic law and foreign law." WHO *Amicus* Br. at 11.

CONCLUSION

The petition should be accorded GVR treatment. Alternatively, the petition should be granted and accorded plenary consideration. The case is of profound international importance. The Courts of Appeals are in clear conflict about the scope of the revenue rule. This Court should exercise its supervisory power to provide authoritative guidance in this crucially important area.

Respectfully submitted,

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